Ja-Wex Sportswear, Ltd. and Iris Sportswear, Inc. *and* Knitgoods Workers' Union, Local 155, International Ladies' Garment Workers' Union, AFL-CIO. Cases 29-CA-8470, 29-CA-8573, 29-CA-8906, and 29-RC-5224

March 26, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On December 7, 1981, Administrative Law Judge James F. Morton issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Ja-Wex Sportswear, Ltd. and Iris Sportswear, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Upon request, bargain with Local 155 as the exclusive collective-bargaining representative of all full-time and regular part-time production and maintenance employees employed by Respondent at its plant in New York, New York, including all shipping and receiving employees and porters but excluding all sample hands, office clerical employees, guards and supervisors as defined in the Act, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT unlawfully interrogate our employees concerning their activities on behalf of Knitgoods Workers' Union, Local 155, International Ladies' Garment Workers' Union, AFL-CIO.

WE WILL NOT threaten to close our plant to discourage our employees from joining Local 155 or selecting it as their collective-bargaining representative.

WE WILL NOT offer money or medical benefits to our employees to discourage them from supporting Local 155.

WE WILL NOT distribute literature on behalf of United Production Workers Union Local 17-18, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, or offer to pay dues to that union on behalf of our employees or promise our employees benefits to induce them to select Local 17-18 as their collective-bargaining representative.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL recognize, effective from December 19, 1980, and, upon request, bargain collectively and in good faith with Local 155 as the exclusive bargaining representative of all our full-time and regular part-time production and maintenance employees employed by us at our New York, New York, plant, including all shipping and receiving employees and porters but excluding all sample hands, office clerical employees, guards and supervisors as defined in the Act, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding thereon is reached, embody such understanding in a signed agreement.

JA-WEX SPORTSWEAR, LTD. AND IRIS SPORTSWEAR, INC.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In his recommended Order, the Administrative Law Judge inadvertently failed to provide that, if, after bargaining, the parties reached an understanding, Respondent embody such understanding in a signed agreement. We hereby modify his recommended Order to so provide.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge: On November 25, 1980, Knitgoods Workers' Union, Local 155, International Ladies' Garment Workers' Union, AFL-CIO (herein called Local 155), filed the unfair labor practice charge in Case 29-CA-8470 against Ja-Wex Sportswear, Ltd. and Iris Sportswear, Inc. (herein called Respondent). On January 28, 1981, the General Counsel issued a complaint in that case against Respondent alleging that it violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein called the Act). On February 2, 1981, Respondent filed its answer to that complaint in which it denied the allegations of certain paragraphs of that complaint and omitted references to the other allegations. The pleadings thus placed in issue, with respect to that case, whether Respondent unlawfully interrogated its employees concerning their activities for Local 155; whether it threatened to close its plant to discourage those employees from joining Local 155; whether it unlawfully laid off two named employees for 3 to 4 weeks in late 1980 because of their support for Local 155; whether Respondent unlawfully distributed literature on behalf of United Production Workers Union, Local 17-18; United Brotherhood of Carpenters and Joiners of America, AFL-CIO (herein called Local 17-18); and lastly whether Respondent's floor lady, Maria Irezarry, was an agent of Respondent in having participated in some of the foregoing alleged violations of the Act.

On January 15, 1981, Local 155 filed a second unfair labor practice charge, Case 29-CA-8573, against Respondent, and on February 24, 1981, a complaint thereon issued against Respondent alleging that it threatened its employees with discharge, plant closure, and other reprisals to discourage their support for Local 155; that Respondent engaged in further acts of unlawful interrogation; and that Respondent offered medical benefits, money, and other benefits to discourage its employees from supporting Local 155. Respondent filed an answer thereto on February 25, 1981, in which it placed in issue those alleged unlawful acts.

On May 19, 1981, Local 155 filed a third unfair labor practice charge, Case 29-CA-8906, against Respondent and therein alleged that Respondent had unlawfully refused to bargain collectively with it in violation of Section 8(a)(1) and (5) of the Act. On June 26, 1981, a complaint issued in that case which alleged, *inter alia*, that Respondent's production and maintenance employees comprised a unit appropriate for collective bargaining, that Local 155 had been the majority representative of those employees, that Local 155 has requested Respondent to recognize it as the bargaining agent of those employees, and that Respondent has refused to do so notwithstanding the further allegation that Respondent had engaged in and is engaging in a course of conduct which has precluded the holding of a fair election among those unit employees. The concluding allegation of the complaint in Case 29-CA-8906 was that Respondent in violation of Section 8(a)(1) and (5) has been obligated to recognize Local 155 as the bargaining agent of its production and maintenance employees and that it has unlawfully failed and refused to do so. Respondent filed its answer thereto on June 29, 1981, and thereby placed in issue the alleged majority status of Local 155, the alleged request to bargain, and whether the issuance of a bargaining order would be an appropriate remedy.

A related representation case matter has been consolidated for hearing with the above three unfair labor practice cases. Local 155 had filed a petition in Case 22-RC-5224 on December 3, 1980, whereby it sought to represent the production and maintenance employees of Respondent. On December 9, 1980, an agreement for a consent election in that case was approved. The election was conducted pursuant to that agreement on January 8, 1981, in a unit of the approximately 20 full-time and regular part-time production and maintenance employees employed by Respondent, including shipping and receiving employees and porters, but excluding all sample hands, office clerical employees, guards and supervisors as defined in the Act. Of the 20 valid votes cast in that election, 8 were in favor of representation by Local 155 and 12 were against. Local 155 filed timely objections to the conduct of that election. On February 27, 1981, a Report on Objections issued in that case. Therein, all but Objection 3 was dismissed. In Objection 3, Local 155 contended that Respondent had, in violation of the Act, interrogated its employees, threatened plant closure, and promised benefits to its employees to dissuade them from voting for Local 155 and thereby interfered with the conduct of the election. Based upon the administrative investigation of that objection, it had been reported that substantial and material issues of fact were presented thereby, including issues of credibility pertaining to alleged conduct which occurred after the filing of the petition, and that, with respect to alleged conduct which occurred prior to the filing of the petition, evidence thereon may be considered insofar as it "lends additional meaning" to postpetition conduct. On that premise a hearing was directed with respect to the issues raised by Objection 3.

By Order dated August 6, 1981, the three unfair labor practice cases discussed above, together with the hearing on objections in the related representation case, were all consolidated for hearing. The hearing in these cases was held on August 10 and on September 1 and 2, 1981, in New York City.

Upon the entire record in these cases, including my observations of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The pleadings and the stipulations received at the hearing establish that Iris Sportswear, Inc., is the successor to Ja-Wex Sportswear, Ltd. As noted above, both have been referred to herein collectively as Respondent. On the basis of the pleadings, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Based also on the

pleadings, I find that Local 17-18 is a labor organization as defined in Section 2(5) of the Act, as is Local 155.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Ja-Wex Sportswear, Ltd., was formed in August 1977. It occupied the second floor of a plant located in the county of Queens and city and State of New York, herein called the Queens plant. There it was engaged as a manufacturer of knitted garments; it also assembled knitwear on a contract basis. It had approximately 20 production and maintenance employees classified as sewing machine operators, cutters, pressers, steamers, porters, floor helpers, and general helpers. Its plant manager, from October 1 to 31, 1980, was Morris Sobel.

In November 1980, Iris Sportswear, Inc., was formed and, as noted above, it took over the operations of Ja-Wex Sportswear, Ltd., at the Queens plant. It hired a new plant manager, Robert Lambert. Lambert had owned his own knitgoods business.

The events relevant to the instant cases began about 2 weeks before Iris Sportswear succeeded to the interest of Ja-Wex Sportswear.

B. *The Local 17-18 Literature*

Respondent's president, Leonard Wexler, testified that in mid-October 1980 he was visited by a representative of Local 17-18. Wexler related that he accepted literature from the Local 17-18 representative and agreed to distribute it to his employees. On his direct examination, he stated that nothing further was said in his discussion with the Local 17-18 representative. On cross-examination, however, he testified that he asked the Local 17-18 representative "[w]hat the costs would be and so forth, and he [the Local 17-18 representative] replied." Wexler further testified that the Local 17-18 representative told him that the usual procedure is that an employer pays half of the union dues and that the employees pay the other half.

Wexler gave the Local 17-18 literature to the floor lady, Maria Irezarry, and instructed her to pass it out to the employees. Witnesses called by the General Counsel testified without contradiction that Irezarry gave them the literature in mid-October 1980 and told them that Lennie Wexler had given the literature to her for distribution to them. One of the machine operators, Violeta Solis, testified that she went to Wexler's office on the following day and, in essence, informed him that the employees were not impressed with the Local 17-18 "benefits." She testified that Wexler told her that Local 17-18 is his new partner's union, and that, if the employees brought in another union, he would close the factory. Wexler, in his testimony, denied that he had any meeting with any employee prior to the meeting described in the next paragraph; he testified, as discussed in detail below, that he did have a conversation with Violeta Solis alone after he had met with a number of employees to discuss the Local 17-18 literature. I credit the account of Violeta Solis as she impressed me as being straightforward in her testimony, whereas Wexler equivocated. Further, I find incredible Wexler's testimony that he was informed by the Local 17-18 representative of the usual procedure governing dues payments. While it is possible that an individual who owns a garment assembly facility in New York City would accept without question a representation by an official from a local affiliated with the Carpenters' International Union that it is customary for an employer to pay half the union dues for its employees, it is not likely.

Another operator, Rosa Osorio, testified for the General Counsel that Wexler met with a number of the operators in his office in mid-October to discuss Local 17-18. Osorio did the talking on behalf of the employees and also translated Wexler's remarks into Spanish for the benefit of her coworkers. Osorio testified that she told Wexler that Local 17-18 did not give the employees any benefits and that they did not want that union because it was not worthwhile. She testified that Wexler then said that that was the only "thing" he could afford and that maybe later on he could give them other benefits. Mercedes Gonzales, employed by Respondent as a helper, testified that at that meeting Wexler stated in response to a statement by Osorio that he could not afford any other union because it would be too expensive. When she indicated that her recollection was exhausted as to any other statement at that meeting, she was asked if Wexler had said anything about what he would do if another union came in. Gonzales then stated that Wexler then said that if another union came in he would close the plant. I do not credit this testimony by Gonzales as it was not corroborated by Osorio who did the translating for Wexler and as none of the other employees who were present at that meeting and who testified for the General Counsel corroborated it.

As noted above, Wexler testified that after that meeting he met separately with Violeta Solis in his office and that he, in his discussion with her, merely repeated everything he had said at the meeting itself. I do not credit that account as it is unlikely that the president of a small company would have a meeting with a group of employees and use the services of one of them as a translator and then immediately afterwards attempt to repeat in English the same remarks which had just been translated to that employee in Spanish by a coworker.

When the employees expressed to Wexler their dissatisfaction with Local 17-18, that Union faded out the picture and was not heard of again.

C. *Alleged Threat by Respondent at the Outset of Local 155's Organizing Drive*

Alleged discriminatee Clara Fernandez testified that, after the employees had informed Wexler that they did not want to have anything to do with Local 17-18, two employees, Rosa Osorio and Violeta Solis, "did some research" about unions and the employees then had decided that Local 155 was the best union. According to Fernandez, she then telephoned Local 155. An organizer from that Union appeared outside Respondent's plant in late October 1980.

Fernandez testified that on or about October 27 she left the plant with Rosa Osorio and noticed that Respondent's president then was "around in the street" and

that "he never used to be around at that time." She testified that she told Osorio that "Lennie" (i.e., Wexler) was watching them. According to Fernandez, she and Osorio then went into the car operated by one of the Local 155 representatives, where they signed cards for Local 155. Osorio's account of that incident substantially corroborated Fernandez' testimony.

Respondent's president testified that he had no knowledge whatsoever of Local 155's interest in organizing Respondent's employees until after he had received a copy of the unfair labor practice charge filed in Case 29-CA-8470 by Local 155 on November 25, 1980. He testified also that he had been informed by his landlord, who occupies the first floor of the building, that there were people outside the building passing out literature and that when he, Wexler, walked downstairs he had seen no one there. Wexler further testified that on the following day he had asked employee Violeta Solis if she knew anything about any literature being distributed and that she replied, "she thinks so," but she was not sure; he testified also that she said then that she did not know anything about it. I credit the account of Fernandez and Osorio as they were mutually corroborative and as Wexler's account is confused, contradictory in part, and vague. Further, Wexler's testimony that he was not aware of Local 155's interest when its organizer appeared outside Respondent's plant is not persuasive. His landlord alerted him to that organizing effort. He went immediately downstairs, according to his own account, and questioned an employee about the distribution of literature. His testimony that he received an equivocal answer is not plausible, particularly as there is nothing to indicate that he sought clarification or why he had not made an effort to do so.

In early November 1980, eight other employees, including alleged discriminatee Violeta Solis, signed Local 155 authorization cards at a meeting held at the home of Rosa Osorio.

The General Counsel adduced testimony from several witnesses respecting a meeting they said they had with Respondent's president, Leonard Wexler, shortly after the meeting at Osorio's house. Wexler testified that he never had any such meeting with the employees. Osorio testified that she, Clara Fernandez, Carmen Vasquez, Miriam Cruz, Leonor Parra, and several other employees were present at a meeting in Lenny Wexler's office a few days after the group had signed Local 155 cards. She testified that Wexler told them that he knew about Local 155 but that he could not afford that Union because it cost a lot of money. She testified that she could recall nothing else that was said then. Counsel for the General Counsel then asked her if she had given an affidavit before the hearing and then asked her if she recalled whether anything else was said at that meeting. Thereupon Osorio testified that Wexler had said at that meeting that "he would rather close the place down instead of having a union."

Another of Respondent's employees, Mercedes Gonzales, testified that that meeting was held in the shop about 2 days after the Local 155 cards were first passed out. (That testimony places the meeting in early November.) Fernandez related that she heard Wexler say then, as she was passing by, that he could not afford Local 155. Her prehearing affidavit related that the meeting was held in late Novenber (when a number of employees were on layoff status).

Violeta Solis testified that on October 28, 1980, Wexler came to her work station while she was working and asked to speak to her after lunch. She testified that after lunch she went to his office and met with him there alone. She testified that Wexler told her, "[T]his union's contracts were coming from his new partner" (apparently a reference to Local 17-18, and not to Local 155). Solis testified further that Wexler told her that the employees should accept that union because "it was a good contract." She was then asked by counsel for the General Counsel if she recalled whether there was any talk then about Local 155. In response, she said that Wexler had said that he would not accept any other union and that if another union were selected he would close the factory. The record indicates that counsel for the General Counsel thereupon sought to examine Violeta Solis respecting a meeting Wexler held with employees shortly after Local 155 began its organizing drive. However, the responses elicited from Solis thereon concerned a meeting at which Wexler had urged them to select Local 17-18 as their representative.

Clara Fernandez testified that, on October 28, Wexler spoke to the employees outside his office and told them that he could not accept Local 155 as the employees' union, that he could only accept Local 17-18, and that he would prefer to close his factory rather than have another union in there.

Although the accounts offered by the General Counsel's witnesses did not mesh and certain material aspects of their testimony were developed only after some prodding by counsel for the General Counsel, I credit them. In particular, I find that Osorio and Fernandez were testifying as accurately as they could. Further, it is unlikely that Wexler held no meeting with these employees, as he contends, when his own account suggests strongly that he wanted them to support Local 17-18. Wexler would not have been indifferent to the employees' interest in Local 155.

The following matters pertain to coercive statements allegedly made by Respondent's agents after the representation petition had been filed by Local 155 on December 3, 1980.

Employee Rosa Osorio testified that on December 19, 1980, and again on January 8, 1981, Respondent's president, Wexler, told her while she was at her work station that he would close down the plant if the employees selected Local 155. Wexler testified that on October 19, 1980, he had told Osorio simply that he hoped he could keep his business going if Local 155 won the election and that he then assured her that he had no intention of closing his plant. Wexler did not specifically deny Osorio's testimony as to the January 8 incident; in its brief, Respondent alludes to Osorio's testimony as "transparent." I credit Osorio's account as she seemed to me to be trying to recall the events accurately, whereas Wexler's testimony was somewhat ambiguous and unpersuasive.

Maria Gonzales testified that on the morning of January 8, 1981 (the day of the election), Wexler told her that he could not afford Local 155 because it was too expensive for him and that he would close the plant if it won. Wexler did not specifically deny so advising Gonzales. His testimony, however, expressly controverts her account as he stated he never discussed the election with her. I credit Gonzales' account. While I did not credit a certain aspect of her testimony on another point, as discussed above, I find that her account as to the January 8 incident is believable, particularly as Wexler for months previously had expressed interest in Respondent's having, what the General Counsel calls, an "affordable" union.

Jesus Pardo testified that he had worked for Respondent as a porter from August 1980 until he was discharged for cause on January 23, 1981. He had filed an unfair labor practice charge against Respondent respecting that discharge. That charge was either withdrawn by him or was dismissed administratively. Pardo testified at the hearing before me that, about 1 or 2 weeks before the election, Wexler talked to him, through a Spanish translator (Maria Irezarry), about the election and that "Bobby," whom he identified as the "new boss," was also present then. The record establishes that Respondent had engaged Robert Lampert as its new plant manager on November 7, 1980. According to Pardo's account, Wexler began the interview by telling him that he should be grateful he had a job with Respondent and reminded him that he had a social security number when he had none when he began work for Respondent. Pardo related that Wexler told him that "a person who is not thankful is a person who causes horror."[1] Pardo testified that Wexler asked him, through Irezarry, if he was going to vote for Local 155 and that he, Pardo, told Wexler that he would vote for him (i.e., Wexler). Pardo related that Wexler then promised him money, without specifying any amount, and that Wexler also stated that, if Local 155 won the election, he (Wexler) would have to "close the factory within two months."

Wexler testified that he never spoke to Pardo about the election or offered him money to influence his vote. Respondent did not call Plant Manager Robert Lampert, or floor lady Maria Irezarry to rebut Pardo's account of that meeting.

I credit Pardo's version and not the uncorroborated, summary denials of Wexler.

Pardo also testified that floorlady Maria Irezarry had, on several occasions, including two in early January 1981, told him that Wexler would close the factory if Local 155 came in. As noted above, Irezarry did not testify at the hearing. The record, however, establishes that she assigns to the operators the work they do; that she rarely does production work; that she is salaried like Wexler and the plant manager, unlike the operators who are hourly paid; and that she has, according to both the uncontroverted and credited testimony, assisted Wexler in endeavoring to persuade employees to accept Local 17-18 and to reject Local 155.

As Pardo's accounts respecting his conversations with Irezarry in early January 1981 were not controverted and as I find his general demeanor believable, I credit his testimony thereon.

D. *The Alleged Discriminatory Layoffs of Violeta Solis and Clara Fernandez*

The General Counsel contends that Violeta Solis was laid off on November 14, and not recalled until early December 1980, because of her activities in support of Local 155 and that Clara Fernandez was laid off from November 21 to December 11, 1980, for the same reason. In support of those allegations, they testified, as noted above, that they participated in activities in support of Local 155 in signing cards and in attending meetings. In addition, they testified without contradiction that they also passed out Local 155 authorization cards and obtained signatures from several employees. Both Fernandez and Solis testified that prior to late 1980 they had never been laid off for any extended period of time by Respondent.

The parties stipulated at the hearing to the admission of documentary material which establishes that Respondent had, in late October and early November 1980, laid off for economic reasons six employees, other than Solis and Fernandez. In addition, the record testimony establishes that Rosa Osorio was laid off for a week in November 1980 as was another employee, Rosa Ramos. There is no allegation that the layoff of Rosa Osorio was in any way discriminatory, although, as is apparent from the foregoing recital of facts, she was a key spokesman for the employees and it was in her house that Local 155 held its first union meeting. It is uncontroverted too that, in the second week of December 1980, all of the laid-off employees, including Fernandez and Solis, were recalled and that on December 8, 1980, Respondent also hired another sewing machine operator. It appears that, during their layoff period, floorlady Maria Irezarry performed principally routine production work; the only time she had ever worked on sewing machines before was in making samples or in demonstrating to new employees how to operate the machines.

Respondent offered into evidence records of its gross sales for the months of October, November, and December, 1980, which showed a marked decrease in sales volume. The evidence is uncontroverted that the last part of each calendar year is a very slow period for Respondent's business. Respondent's president testified without contradiction that he had taken out a second mortgage on his home to finance Respondent's operations.

E. *Local 155's Alleged Majority Status*

It is undisputed that in mid-November 1980, Respondent had 28 production and maintenance employees in its employ and that Local 155 had signed authorization

[1] Respondent has observed in its brief that this is a "classic line" and that Pardo's testimony was "patently absurd." I do not reject his account because the record in this case contains a horrendous English language sentence which translates Pardo's testimony given at the hearing in Spanish. I have no doubt that Wexler did not use those words but that is not a basis to reject Pardo's account. The essence of Pardo's testimony is that Wexler expected him to be appreciative and that he should not be an ingrate. I will only surmise that the use of Spanish vernacular to convey that sentiment may require a stilted translation, if an appropriate idiomatic expression in English is not substituted for the literal Spanish.

cards from 16 of these. Two other unit employees signed Local 155 authorization cards shortly before their recall to work on December 11, 1980.

III. ANALYSIS

A. *Alleged Unlawful Interrogation, Threats, and Other Coercive Acts*

As noted above, the pleadings placed in issue the question as to whether Maria Irezarry acted as an agent of Respondent in distributing literature for Local 17-18 and engaged in other acts related to the union activities of Respondent's production and maintenance employees. The evidence firmly establishes that Irezarry acted as Respondent's agent. The controlling principle of law is clear. An employer is responsible for the conduct of an employee where, from all of the relevant circumstances, it leads the employees to believe reasonably that the employee in question was reflecting company policy, and was speaking and acting for management.[2] The uncontroverted facts disclose that Irezarry distributed the Local 17-18 literature in Respondent's plant and informed employees she was doing it at the request of Respondent's president. Respondent's president later confirmed this and in fact testified that he instructed her to distribute the literature. The credited testimony further discloses that the remarks that Irezarry made, to the effect that Wexler said he would close the plant if any union other than Local 17-18 came in, were also said by Wexler himself to the employees. The other relevant factors clearly indicate that the employees had a reasonable basis for believing that Irezarry acted on behalf of management. Thus, she was like Wexler and unlike the production employees on salary; she had the job title, floor lady; she distributed work to the operators to insure that they kept busy; she regularly translated the remarks of Wexler from English into Spanish for the employees; she virtually did no regularly production work; and she, unlike the employees, did not punch a timecard. I therefore conclude that at all times herein Irezarry acted as an agent for Respondent.

The credited evidence further establishes that Respondent, through Wexler and also through Irezarry, distributed literature on behalf of Local 17-18 which contained a listing of benefits available to the employees, and that Respondent promised benefits to and urged employees to select Local 17-18 as their bargaining representative and offered to pay half of Local 17-18's dues. By promising these benefits and urging its production and maintenance employees to select Local 17-18 as their bargaining representative, Respondent interfered with, restrained, and coerced its employees with respect to the rights guaranteed them under Section 7 of the Act, and thereby Respondent violated Section 8(a)(1) of the Act.[3]

The repeated threats by President Wexler to close Respondent's plant if the employees chose a labor organization other than Local 17-18 as their collective-bargaining representative were separately violative of Section 8(a)(1) as were the statements by Irezarry to the same effect.

I further find that Respondent, by Wexler and Irezarry, unlawfully interrogated employees Solis and Pardo respectively, and Respondent thereby separately violated Section 8(a)(1) of the Act.

The offers of money and promise of medical benefits made by Wexler to Pardo shortly before the election constituted additional violations of Section 8(a)(1).

B. *The Objections*

The Report on Objections which had issued in Case 29-RC-5224 recited that the merits of Objection 3 are referred to me for hearing and for ruling and that thereafter Case 29-RC-5224 shall be severed and transferred to the Regional Director for Region 29 for further processing pursuant to the agreement for a consent election approved in that case. Based on the credibility resolutions made above and the related findings that Respondent violated Section 8(a)(1) of the Act by having threatened to close its plant, interrogated employees, and promised benefits to them in order to discourage them from supporting Local 155, I find that Respondent engaged in conduct which interfered with the rights of its production and maintenance employees to select freely in a Board-conducted election whether or not they desired to be represented by Local 155 for purposes of collective bargaining. I shall, to be consistent with that determination, recommend that Objection 3 be sustained, and that the results of the election held on January 8, 1981, be set aside.

C. *The Alleged Discriminatory Layoffs*

The evidence establishes that Violeta Solis and Clara Fernandez actively supported Local 155 and, in that regard, that they solicited authorization cards for that Union. They were laid off summarily, shortly after Local 155's advent, and were not recalled until about 4 weeks later. They had never previously experienced such a lengthy layoff while in Respondent's employ. Those factors, taken in context with Respondent's unlawful attempts to dissuade its employees from supporting Local 155, satisfied me that the General Counsel had made out a *prima facie* case that Solis and Fernandez had been discriminatorily laid off in violation of Section 8(a)(1) and (3) of the Act and that therefore the burden of coming forward with evidence to rebut that evidence was placed upon Respondent.

Respondent thereupon established that eight other employees had also been laid off in late 1980 and that many of those employees were also supporters of Local 155. There is no contention that the layoffs of those other employees were violative of Section 8(a)(1) and (3). Further, the General Counsel's witnesses conceded that the late months of each calendar year are normally slow months for Respondent and that the period from October to December 1980 was unusually slow. While the Gener-

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[2] *Wm. Chalson Co., Inc.*, 252 NLRB 25 (1980); *EMR Photoelectric, a Division of Sangamo Weston, Inc.*, 251 NLRB 1597 (1980); *Community Cash Stores, Inc.*, 238 NLRB 265 (1978).

[3] *Professional Building Maintenance Division of PBM Industries, Inc.*, 217 NLRB 127 (1975).

al Counsel contends that Respondent had hired two new employees during the layoff of Solis and Fernandez, it appears that those two new employees began working for Respondent at or about the same time that all of the laid-off employees, including Solis and Fernandez, were recalled to work in mid-December 1980. Lastly, Respondent placed into evidence sales figures for October through December 1980, and these showed that there was a large drop in the volume of sales for November as compared to October and also for December as compared to November and October. It is evident, and I thus find, that Respondent has discharged its obligation to come forward with sufficient evidence to rebut the General Counsel's *prima facie* case.

The General Counsel did not then produce any evidence that the reason proffered by Respondent was pretextual. In that regard, it is noted that the General Counsel did not place into evidence sales figures or other production records for previous years in an effort to show that Respondent seized upon a normal fall off in business to lay off two union supporters. I therefore conclude that the General Counsel has failed to establish by a preponderance of the credible evidence that Respondent laid off Solis and Fernandez for several weeks in late 1980 because of their support for Local 155.

D. *The Bargaining Order Remedy*

The Board has noted that the Supreme Court affirmed the authority of the Board to issue a bargaining order not only in "exceptional cases" marked by "outrageous and pervasive" unfair labor practices which eliminate the possibility of holding a fair election, but also in "less extraordinary cases marked by less pervasive practices" where there is a showing that at one point a union had a clear majority and where the Board concludes that the extensiveness of the unfair labor practices committed by Respondent "have the tendency to undermine majority strength and impede the election processes."[4] The Board has also observed that a warning by an employer that an operation will be shut down if employees select union representation is considered "one of the most potent instruments of employer interference with the right of employees to organize" and that, since most employees are dependent on their jobs for their livelihoods, threatening to eliminate their place of employment is sufficiently serious to justify a bargaining order, even standing alone.[5]

The repeated threats to close made by Respondent, including those on the very morning of the election and the other violative acts as found above, taken in context with the small size of Respondent's work force, are clearly sufficient to create an unacceptable risk that any election now held would not reflect a choice made free of coercive influence. Therefore, I find that Respondent's unfair labor practices destroyed Local 155's majority status and were sufficiently serious and pervasive in character to preclude the holding of a fair election and warrant the issuance of a bargaining order remedy. Under established principles,[6] the bargaining order shall be dated from December 19, 1980, the first date on which it was shown that Respondent renewed its coercive campaign after Local 155 had obtained signed authorization cards from a majority (18 of 28) of the employees employed in the unit found appropriate in Case 29-RC-5224; i.e., all full-time and regular part-time production and maintenance employees, including shipping and receiving employees and porters employed by Respondent at its Queens plant, but excluding all sample hands, office clerical employees, guards and supervisors as defined in the Act.

The complaint in Case 29-CA-8906 alleges that on December 8, 1980, Local 155 had requested Respondent to bargain collectively with it as a representative of the employees in the unit found appropriate above and that complaint alleged also that, since December 8, 1980, Respondent refused to bargain thereon and thereby violated Section 8(a)(1) and (5) of the Act. Respondent's answer denied that Local 155 had ever so requested to bargain. No evidence was offered at the hearing to establish that Local 155 made such a bargaining request. The fact that Local 155 filed a petition for an election does not serve to relieve it of the obligation to have made such a request as the Board has held that the mere filing of such a petition does not constitute the requisite demand to establish a violation under Section 8(a)(5) of the Act.[7] In the absence of any evidence of such a request, I find no merit to the General Counsel's contention that Respondent violated Section 8(a)(5) of the Act.[8] Respondent has separately urged that a bargaining order should not issue in view of the amount of employee turnover since the election on January 8, 1981. The Board has given careful consideration to that contention.[9] For essentially the same reason set out in that decision, I reject Respondent's present contention.

CONCLUSIONS OF LAW

1. Ja-Wex Sportswear, Ltd. and Iris Sportswear, Inc. (herein referred to jointly as Respondent), is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Knitgoods Workers' Union, Local 155, International Ladies' Garment Workers' Union, AFL-CIO, and United Production Workers Union, Local 17-18, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. At all times material herein, Maria Irezarry has been an agent of Respondent.

4. By unlawfully interrogating its employees concerning their activities on behalf of Local 155; by distributing literature for Local 17-18 and offering to pay dues to

[4] *Hitchiner Manufacturing Company*, 243 NLRB 927, 928 (1979). Respondent contends that at most the General Counsel has demonstrated only a series of minor violations and urges that established law precludes the issuance of a bargaining order. Were I to accept that view, I would also accept the cases cited by Respondent as controlling thereon; e.g., *Walgreen Company*, 221 NLRB 1096 (1975). The violations in the instant cases, however, are more serious than those found in the decisions cited by Respondent.

[5] *Jim Baker Trucking Company*, 241 NLRB 121, 122 (1979).

[6] *Trading Port, Inc.*, 219 NLRB 298 (1975).

[7] *J. J. Newberry Co., a Wholly Owned Subsidiary of McCrory Corporation*, 249 NLRB 991, 1010 (1980).

[8] *Grandee Beer Distributors, Inc.*, 247 NLRB 1280 (1980).

[9] *Armcor Industries, Inc.*, 227 NLRB 1543 (1977).

Local 17-18 on behalf of its employees; by offering benefits to its employees to induce them to select Local 17-18 as their bargaining representative; by threatening to close its plant should they select Local 155 or any other labor organization as their collective-bargaining representative; and by offering money and medical benefits to employees to discourage them from supporting Local 155, Respondent has violate Section 8(a)(1) of the Act.

5. Respondent did not violate Section 8(a)(1) and (3) of the Act by laying off employees Violeta Solis and Clara Fernandez in late 1980 and did not violate Section 8(a)(5) of the Act as there was no evidence that Local 155 had requested Respondent to bargain collectively with it.

6. The unfair labor practices described above in paragraph 4 are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. An appropriate remedy in the circumstances of this case for the foregoing unfair labor practices is to require Respondent to bargain collectively with Local 155 as the exclusive representative for purposes of collective bargaining of all full-time and regular part-time employees, including shipping and receiving employees and porters employed by Respondent at its Queens plant, but excluding all sample hands, office clerical employees, guards and supervisors as defined in the Act.

8. Objection 3 filed in Case 29-RC-5224 to the election held on January 8, 1981, should be sustained and the results of that election set aside.

9. As the issuance of a bargaining order to Local 155 precludes a finding that a question concerning representation exists with respect to the unit of employees found appropriate herein, the petition in Case 29-RC-5224 should be dismissed, if not withdrawn.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[10]

The Respondent, Ja-Wex Sportswear, Ltd. and Iris Sportswear, Inc., New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unlawfully interrogating its employees concerning their activities on behalf of Knitgood Workers' Union, Local 155, International Ladies' Garment Workers' Union, AFL-CIO (herein called Local 155).

(b) Soliciting, offering to pay the dues of, and promising to grant benefits to its employees to induce them to select as their collective-bargaining representative United Production Workers Union Local 17-18, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

(c) Threatening to close its Queens plant to induce its employees to refrain from joining Local 155.

(d) Offering money and medical benefits to induce its employees not to support Local 155.

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with Local 155 as the exclusive representative of all full-time and part-time production and maintenance employees employed by Respondent at its plant in New York, New York, including all shipping and receiving employees and porters, but excluding all sample hands, office clerical employees, guards and supervisors as defined in the Act.

(b) Post at its New York, New York, plant copies of the attached notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

The allegations that Respondent violated Section 8(a)(3) and (5) of the Act are dismissed.

Case 29-RC-5224 is severed and returned to the Regional Director for Region 29 pursuant to the Report on Objections issued in that case.

[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[11] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."